IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-154

WILSON H. ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND,

Petitioner,

v.

JUAN CARLOS MORENO, ET AL.,

Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS, AND VIRGINIA, AND THE STATES OF ALASKA, CONNECTICUT, DELAWARE, GEORGIA, IDAHO, INDIANA, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI

The interests of amici and their reasons for urging this Court to reverse the decision of the United States Court of Appeals for the Fourth Circuit in *Moreno v. University of Maryland*, 556 F.2d 573 (4th Cir. 1977), *aff'g*, 420 F. Supp. 541 (D. Md. 1976), are as follows:

Amici are states and the nation's foremost association of colleges and universities. All are vitally concerned with preserving a rational system of tuition rate assignments for students in publicly-supported colleges and universities in order to ensure the fiscal integrity of these institutions.

Amici maintain that proper application of constitutional principles warrants overruling the irrebuttable presumption doctrine of *Vlandis v. Kline,* 412 U.S. 441 (1973), which has been used as a mechanism for striking down countless state legislative judgments.

QUESTIONS PRESENTED

I. Whether strict judicial scrutiny, in the guise of an irrebuttable presumption analysis which is inconsistent with traditional constitutional analysis and financially deleterious to public colleges and universities, must be applied to a rationally based in-state and out-of-state tuition policy such as that of the University of Maryland and of the great majority of public institutions of higher education in the United States?

II. Whether recent decisions of this Court have so eroded the irrebuttable presumption doctrine embodied in *Vlandis v. Kline,* 412 U.S. 441 (1973), that this Court should now declare that doctrine overruled?

ARGUMENT

THE IRREBUTTABLE PRESUMPTION DOCTRINE SHOULD BE REJECTED AS A TOOL TO GAUGE GOVERNMENT CLASSIFICATIONS.

The lower court decisions attacked by Maryland hold that the University of Maryland's policy of denying in-state status to non-immigrant aliens creates an irrebuttable presumption violative of the due process clause of the fourteenth amendment.

As one recent commentator has noted, "it is difficult to recall any doctrine utilized by the [Supreme] Court in recent years which has met with such a degree of antipathy as has the irrebuttable presumption/procedural due process analysis." J. Chase, *The Premature Demise of Irrebuttable Presumptions,* 47 U. Colo. L. Rev. 653 (1976). With its roots in cases decided in the heyday of substantive due process analysis,[1] the doctrine lay dormant for nearly 40 years, as this Court reestablished the line between legislation and adjudication and removed from judicial inquiry the subject of the wisdom of legislation. When the doctrine reappeared in the early seventies, the first results reached were neither startling nor inconsistent with those reached through more traditional methodologies. In *Bell v. Burson,* 402 U.S. 535 (1971), the Court held that Georgia must afford a driver a hearing on fault or liability before suspending his license, a result consistent with procedural due process requirements when a "liberty" interest such as the right to pursue a livelihood is impaired; and in *Stanley v. Illinois,* 405 U.S. 645 (1972), a presumption that an unwed father was unfit to have custody of his children was struck down primarily because the challenged legislative scheme affected basic civil rights such as fatherhood.[2]

However, in *Vlandis v. Kline,* 412 U.S. 441 (1973), constitutional theory was set on its head as "strict judicial scrutiny" in the guise of the irrebuttable presumption due process doctrine was used to invalidate a concededly rationally based state classification. Despite the fact that the Connecticut in-state tuition scheme challenged in *Vlandis* created no "property" interest for out-of-state students, *Bishop v. Wood,* 426

[1] Heiner v. Donnan, 285 U.S. 312 (1932); Schlesinger v. Wisconsin, 270 U.S. 230 (1926). In *Schlesinger,* Mr. Justice Holmes in dissent leveled the first blast of criticism at the doctrine.

[2] *Stanley* was decided below and argued in this Court on equal protection grounds.

U.S. 341 (1976), and implicated no "liberty" interest, *see Memorial Hospital v. Maricopa County,* 415 U.S. 250, 260 n.15 (1974), due process was said to require individual determination of in-state status for students. And despite the fact that no constitutionally protected interest was at stake in *Vlandis,* the majority rejected all rational interests proffered in support of the challenged classification, to the point of requiring the State, in the language of "strict scrutiny," to employ the least restrictive alternative to further its ends.

In a prophetic dissenting opinion, Chief Justice Burger expressed dissatisfaction with the irrebuttable presumption doctrine:

> There will be, I fear, some ground for a belief that the Court now engrafts the "close judicial scrutiny" test onto the Due Process Clause whenever we deal with something like "permanent irrebuttable presumptions." But literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might be improved on by individualized determinations so as to avoid the untoward results produced here due to the very unusual facts of this case. Both the anomaly present here and the arguable alternatives to it do not differ from those present when, for example, a State provides that a person may not be licensed to practice medicine or law unless he or she is a graduate of an accredited professional graduate school; a perfectly capable practitioner may as a consequence be barred "permanently and irrebuttably" from pursuing his calling, without ever having an opportunity to prove his personal skills. The doctrinal difficulties of the Equal Protection Clause are indeed trying, but today the Court makes an uncharted drift toward complications for the Due Process Clause comparable in scope and seriousness with those we are encountering in the equal protection area. Can this be what we are headed for?

412 U.S. at 462.

Such fears proved well grounded, as *Vlandis* spawned numerous lower court decisions featuring unprincipled constitutional analysis. *See, e.g., Gurmankin v. Costanzo,* 556 F.2d 184 (3d Cir. 1977) (school district medical and personnel policy preventing blind persons from teaching sighted students in public schools invalidated); *Berger v. Board of Psychological Examiners,* 521 F.2d 1056 (D.C. Cir. 1975) (requirement of graduate degree invalidated as qualification for professional competence); *Hein v. Burns,* 402 F. Supp. 398 (S.D. Iowa, 1975), *rev'd sub nom., Knebel v. Hein,* 429 U.S. 288 (1977) (food stamp regulation disallowing a deduction from net income for federal job training travel allowance held by district court to violate due process); *Salfi v. Weinberger,* 373 F. Supp. 961 (N.D. Cal. 1974), *rev'd sub nom., Weinberger v. Salfi,* 422 U.S. 749 (1975) (nine-month duration of relationship with deceased wage earners as requirement for survivors' eligibility for social security benefits found unconstitutional by district court); *Turner Elkhorn Mining Co. v. Usery,* 385 F. Supp. 424 (E.D. Ky. 1974), *rev'd,* 428 U.S. 1 (1976) (statutory presumption that affliction with black lung disease resulted in miners' total disability struck down by district court).

The advent of *Vlandis* also brought with it reams of critical legal commentary. Students of constitutional law found in the *Vlandis* irrebuttable presumption doctrine a confusion of procedural and substantive due process, Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?,* 72 Mich. L. Rev. 800, 823 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis,* 27 Stan. L. Rev. 449, 461 (1975); a poor substitute for equal protection analysis, 72 Mich. L. Rev. 800, 829, 27 Stan. L. Rev. 449, 465; and a rejection of legislation by classification, Comment, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine,* 7 Ind. L. Rev. 644, 655 (1974).

Since *Vlandis* this Court has applied the doctrine selectively — only in cases where constitutionally protected interests were at stake, *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974); *Turner v. Department of Employment Security,* 423 U.S. 44 (1975); or where the classification at issue utterly lacked a rational basis, *United States Department of Agriculture v. Murry,* 413 U.S. 508 (1973). Like pre-*Vlandis* irrebuttable presumption cases, these decisions could have been reached employing more traditional methods of constitutional analysis. And since 1975 this Court has not struck down a single state law on the basis of the irrebuttable presumption doctrine. Instead, the Court has rejected application of the doctrine in six cases. *Weinberger v. Salfi,* 422 U.S. 749 (1975); *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976); *Murgia v. Massachusetts Board of Retirement,* 427 U.S. 307 (1976); *Knebel v. Hein,* 429 U.S. 288 (1977); *Skafte v. Rorex,* 430 U.S. 961 (1977); *Fiallo v. Bell,* 430 U.S. 787 (1977).[3]

As the dissenters in *Weinberger v. Salfi,* 422 U.S. at 802-03, and legal commentators have noted, 47 U. Col. L. Rev. 653, little was left of *Vlandis* after the *Salfi*

[3] Most recently, in *Califano v. Jobst,* 46 U.S.L.W. 4004 (U.S., Nov. 8, 1977), this Court unanimously reversed a lower court judgment striking down a statute terminating Social Security Act benefits upon the marriage of a disabled child beneficiary. In so doing, this Court said:

> "Instead of requiring individualized proof on a case-by-case basis, Congress has elected to use simple criteria, such as age and marital status, to determine probable dependency. A child who is married or over 18 and neither disabled nor a student is denied benefits because Congress has assumed that such a child is not normally dependent on his parents. There is no question about the power of Congress to legislate on the basis of such factual assumptions. General rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases. *Weinberger v. Salfi,* 422 U.S. 749, 776."

Id. at 4006.

decision. At that time a majority of this Court refused to allow the irrebuttable presumption doctrine to become "a virtual engine of destruction for countless legislative judgments" and reestablished rational basis analysis as the method for gauging classifications not affecting fundamental rights. *Id.* at 772.

Amici urge this Court to reaffirm the principles enunciated in *Salfi* and the line of cases that have followed it and to reject *Vlandis* as an aberration in constitutional law.

The instant case reflects application of an irrebuttable presumption analysis at its worst. Maryland must grant a privilege otherwise available only to taxpaying domiciliaries to a class of aliens precluded by federal law from establishing permanent residence (and not required to pay taxes). Yet the decision of this Court in *Nyquist v. Mauclet,* ___ U.S. ___, 53 L. Ed. 63 (1977), would appear to allow Maryland to deny scholarship assistance to a class of persons in non-immigrant status. Similarly, Maryland, acting under the Social Security Act, could elect to deny state-funded medical benefits to non-immigrant aliens under the decision of this Court in *Mathews v. Diaz,* 426 U.S. 67 (1976).

The line drawn by Maryland between non-immigrants and immigrants for purposes of in-state/out-of-state classification is predicated on a reasonable interpretation of the law of domicile and is supported by past decisions of this Court. *Mathews v. Diaz, supra; Nyquist v. Mauclet, supra.* Moreover, the interests asserted by the State to justify the classification meet the test of rationality set forth in *Salfi.* As Maryland has demonstrated, the in-state policy bears a rational relationship to the University's purpose of limiting its expenditures, efficiently administering the in-state determination and appeals process, and preventing disparate treatment among categories of non-immigrants with respect to tuition and fee differentials.

Knebel v. Hein, supra; Weinberger v. Salfi, supra; Mathews v. Diaz, supra; and *Starns v. Malkerson,* 401 U.S. 985 (1971).

Thus, it is evident that this case raises issues of great importance to states and particularly to their public colleges and universities. The difference between the tuition paid by resident students and those enrolling from out of state represents a vital source of income to these institutions. Nearly five years ago that income was estimated at between $250 and $300 million a year for just 400 public four-year colleges and universities belonging to the National Association of State Universities and Land Grant Colleges and the American Association of State Colleges and Universities. W. Waugh, *Is Out-of-State Tuition Legal?,* 4 Change 22 (Winter 1972-73). Time and inflation have heightened dependency on that income. *Vlandis v. Kline, supra,* held that due process mandated an individualized determination of a student's status and pointed to domicile as a reasonable standard for determining the residential status of a student.

After *Vlandis,* public colleges and universities predicated their tuition policies on student domicile and established elaborate and expensive appeal mechanisms to afford students the individualized determinations they believed to be mandated by this Court. Viewed in the short run, the *Vlandis* decision may have aided a few students deserving of preferential tuition; however, viewed more realistically, the 1973 ruling opened the door to many students who lack even minimal affinity to the states which bear the financial brunt of their education.

In the present case, the lower courts took *Vlandis* one step further by striking down a rational tuition system based on domicile. The decisions below question a public university's ability to adopt a reasonable

determination of domicile consistent with state law, common sense, and decisions of this Court.

CONCLUSION

Because of the deleterious effect of *Vlandis* on a host of state legislative judgments, including rationally based tuition policies of public colleges and universities, and in light of the importance of discarding the irrebuttable presumption doctrine, amici urge that the Court reverse the judgment below of the United States Court of Appeals for the Fourth Circuit, and that in so doing the Court overrule *Vlandis v. Kline, supra.*

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